TEH WAN SANG & SONS SDN. BHD. v. SEE TEOW CHUAN

[O.C.J. (Peh Swee Chin J.) March 2, 1983]
[Kuala Lumpur – Civil Suit No. 3842 of 1977]

Landlord & Tenant – Tenancy agreement for 3 years – Termination of tenancy by tenant before expiry of term – Breach of contract – Landlord not obliged to mitigate losses caused by tenant's breach of contract.

Contract – Tenancy agreement – Repudiation of contract by tenant – Losses suffered by landlord – Mitigation of losses – Principles to be applied by court.

The plaintiff, the registered owner of land with a factory building in question, entered into a written agreement with the defendant whereby the latter was granted a tenancy for a term of 3 years commencing from October 12, 1974 and ending on October 11, 1977 at the monthly rent of $5,928.75. Under the agreement of tenancy, the tenant was required not to do anything, which may be a breach of any of the express conditions endorsed on the document of title under which the land with the building thereon was held.

By a letter dated February 11, 1976, the tenant gave notice that he would vacate the factory building on May 11, 1976. By a letter dated February 12, 1976, the landlord, in reply, refused to accept the tenant's said letter, stating that, provided that the tenant continue to pay rent punctually, and without prejudice to the landlord's right, the landlord would be prepared to look for a new tenant.

By a letter dated May 12, 1976, the tenant's solicitors advised that the tenant had vacated on May 11, 1976 the factory building and enclosed the keys thereto. By letter dated September 21, 1976 the landlord's solicitors informed the tenant's solicitors, of the inability to find a tenant so far and also asked for payment of rent due and up to October 11, 1976 amounting to $41,501.25. This was denied by the tenant. By letter dated April 6, 1977, the landlord's solicitors asked for the tenant's consent to the assigning of the tenancy to a prospective tenant found by the landlord at the same rental. By letter dated April 22, 1977, the tenant's solicitors wrote and referred to their previous letters.

The facts revealed that the landlord was offered $4,000 rental a month by some prospective tenant but the landlord had refused to accept it, insisting instead on the monthly rent of $5,928.75 hitherto paid by the tenant. The landlord preferred to wait until April 1977 when a new tenant was found, at the same rental.

Held: (1) a repudiation in advance by one party to a contract, that he will not perform it before the arrival of the time for the performance by the repudiating party, does not, by itself, amount to a breach of contract, though it may optionally be, of course, regarded as such a breach by the other party in treating it as at an end;

(2) the need or duty to mitigate one's losses can only arise if there is a breach of contract. In this case the breach arose when the landlord finally accepted the anticipatory repudiation, i.e. when the landlord finally took in a new tenant as from May 16, 1977. The claim of the landlord for loss of rent up to May 15, 1977 was therefore valid and proper, and there was no need for the landlord to try to reduce the losses for which the tenant would be responsible. On the other hand, should the court be wrong on this, the landlord had done all it reasonably could in mitigating its losses, by inserting advertisements in the newspapers and passing the word round verbally about the factory building being available for letting.

(3) the standard of conduct of plaintiffs in taking steps to mitigate their losses is one of whether the plaintiffs had acted reasonably, and it is a question of fact;

(4) after crediting and therefore deducting the deposit of $11,857.50 paid by the tenant, the landlord should be awarded the sum of $71,910.00 being arrears of rent together with interest at 4% per annum thereon from May 16, 1977 to date of judgment and thereafter at the rate of 8% per annum to date of payment, with costs to be taxed.

[*Editorial Note:* The defendant appealed to the Federal Court (F.C.C.A. No. 87 of 1983). The said Appeal was heard on August 29, 1983 (Salleh Abas C.J. (Malaya), Seah & Syed Agil Barakbah F.JJ. dismissed the appeal). There was no written Judgment.]

Cases referred to:

(1) *Singma Sawmill Co. Sdn. Bhd.* v. *Asian Holdings (Industrialized Buildings) Sdn. Bhd.* [1980] 1 M.L.J. 21.

(2) *Collector of Land Revenue, Johore Bahru* v. *South Malaya Industries Bhd.* [1978] 1 M.L.J. 130.

(3) *White & Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413 H.L.

(4) *Banco De Portugal* v. *Waterlow & Sons, Ltd.* [1932] A.C. 452, 506.

CIVIL SUIT.

Edmund Yong Joon Hong for the plaintiffs.
K.L. Rekhraj for the defendant.

Peh Swee Chin J.: In what appeared to be, at first sight, a simple and straightforward case, this case does reveal a few points of some interest and importance when dealing with the question of mitigation of losses later.

The following facts are not in dispute. The plaintiff, the registered owner of land with a factory building in question, entered into a written agreement (AB 1, pages 1 to 6) with the defendant whereby the latter was granted a tenancy for a term of three years commencing from October 12, 1974 and ending on October 11, 1977 at the monthly rental of $5,928.75. I shall hereafter refer to the plaintiff as landlord and the defendant as tenant. Under the agreement of tenancy, the tenant was required not to do anything, which may be a breach of any of the express conditions endorsed on the document of title under which the land with the building thereon was held. The

express conditions referred to were set out in a schedule annexed to this agreement. I will set out only two of such express conditions as relevant to the case:–

"(i) The lessee shall within two years from the date of issue of this title or within such further term as may be approved by the State Authority build upon the land hereby leased factories/workshops and building appurtenant thereto not being dwelling house for artisans of a type and to a plan to be approved by the Commissioner of the Federal Capital, Kuala Lumpur and the said land shall not except with the consent of the State Authority be used for any other purpose.

(ii) The lessee shall not use or permit the use of any building erected on the land for any purpose other than that stated in (i) above."

The following facts are also not in dispute. By letter dated February 11, 1976 (Ex. AB 1 – page 9), the tenant's solicitors, on behalf of the tenant, gave notice that he (the tenant) would vacate the factory building on May 11, 1976. By letter dated February 12, 1976 (Ex. AB 1 – page 10) the landlord, in reply, expressly refused to accept the tenant's letter aforesaid, stating that, provided that the tenant continue to pay rent punctually, and without prejudice to the landlord's right, the landlord would be prepared to look for a new tenant. By letter dated February 27, 1976, the tenant's solicitors wrote and said that the tenancy, being a monthly tenancy, three months' notice given was therefore reasonable notice, (Ex. AB 1 – page 12). By letter dated March 1, 1976, the landlord's solicitors replied and maintained that it was a tenancy of three years commencing from October 12, 1974 (Ex. AB 1 – page 13). By letter dated May 12, 1976 (Ex. AB 1 – page 14), the tenant's solicitors advised that the tenant had vacated on May 11, 1976 the factory building and enclosed the keys thereto. By letter dated September 21, 1976, the landlord's solicitors informed the tenant's solicitors, of the inability to find a tenant so far and also asked for payment of the rent due and up to October 11, 1976 amounting to $41,501.25 (Ex. AB 1 – page 22). By letter dated September 22, 1976 (Ex. AB 1 – page 23), liability to pay the same was promptly denied. On April 6, 1977, the landlord's solicitors wrote to tenant's solicitors asking whether the tenant would consent to the assigning the tenancy to a prospective tenant found by the landlord at the same rental (Ex. AB 1 – page 26), and by letter dated April 22, 1977, in reply, the tenant's solicitors wrote and referred to their previous letters, (Ex. AB 1 – page 28). By (Ex. AB 1 – pages 17, 19 and 20), advertisements were inserted in the *Malay Mail*, inviting prospective tenants for the said factory building.

From the above documentary evidence and oral evidence, and in his written submissions, learned counsel for the tenant correctly submitted four points or issues for determination. I will deal with them one by one.

The first issue raised by the learned counsel for the tenant was that the tenancy was assigned with the consent of the landlord to Box-Pak (M) Sdn. Bhd. and rental was paid in fact by the said company. The tenant (DW 1) in his evidence spoke of his application to the landlord for permission to assign it, by (Ex. AB 1 – page 7) and the landlord's solicitors, (by Ex. AB 1 – page 8) wrote asking for the tenant to execute the assignment to the said company. He produced a bill (Ex. P 12) dated January 27, 1976 from the landlord's solicitors for "drafting and engrossing the deed of assignment." The tenant deposed that he had signed the assignment. However the agreement for the assignment that was produced as (Ex. P 10) was obviously on its face, never signed by anyone and this immediately cast doubts on the tenant's allegation of his having signed it. Before applying for permission for assignment, the tenant had written to the landlord (Ex. P 6), saying that the said company had taken over this firm, Syarikat Box-Pak and the landlord, by (Ex. P 7) wrote that the written consent of landlord was required before any assignment of the tenancy. The tenant then wrote for such consent, (Ex. AB 1 – page 7). Learned counsel for the landlord, while referring to the bill sent by the tenant, submitted that as no stamp fee was asked for therein, impliedly, the assignment had come to naught. Learned counsel for the landlord very forcefully referred to the three months' notice of intention to vacate the factory building (Ex. AB 1 – page 9) which was sent by tenant's solicitors, expressly on behalf of the tenant (as an individual), and not for said company i.e. the alleged assignee, and expressly with reference to tenancy of the named tenant, viz. See Teow Chuan, the defendant herein. The inference to me is obvious; if the assignment was really *fait accompli*, why was there no mention or assertion of it, indeed in what appears to me to be the pivotal document of this case, viz. (Ex. AB 1 – page 9)? This issue would appear to be raised for the first time, according to learned counsel for the landlord, as an afterthought in an amended Defence. I find therefore it is certainly more probable

that there was in fact no assignment of the tenancy at all.

The second issue raised by the tenant was, that the agreement of tenancy was null and void because it was a breach of an express condition endorsed on the document of title over the land with the factory building thereon; therefore the said land was liable for forfeiture, the agreement was therefore a fraud and an act defeating the public policy. The contention of learned counsel for the tenant was based on the assumption, that the landlord, a registered proprietor of alienated land, could not sublet the said land to the tenant without prior consent from the State authority. I regret I find the point to be devoid of any merit. An examination of the copy of the document of title, (Ex. FAB 2 – page 1) reveals nothing of that sort, such as the familiar condition endorsed in a lot of other documents of title "that the land leased should not be transferred, leased or charged without the written consent of the Menteri Besar or State authority."

Two cases relied on by learned counsel for the tenant are clearly distinguishable and therefore not applicable at all. In *Singma Sawmill Co. Sdn. Bhd.* v. *Asian Holdings (Industrialized Buildings) Sdn. Bhd.*[1] the condition on the document of title was to cultivate rubber and pineapple but the land owner had built a factory building on it. In *Collector of Land Revenue, Johore Bahru* v. *South Malaya Industries Bhd.*,[2] *inter alia,* the condition of land use was for a light industry specified as manufacture of zinc, wire-netting, screw and nuts. The land was actually used for storing chemical and fertilizers. I ought to mention that prohibition against letting out the factory building was stated, I believe, by learned counsel for the tenant, to be in express conditions (i) and (ii) endorsed on the document of title as set out earlier above. I am unable totally to agree with this contention. How can the court be asked to read into them such a prohibition not mentioned in them?

The third issue raised by the tenant was that the tenancy here was a monthly tenancy and the three months' notice to quit was therefore, presumably, a magnanimous act. Learned counsel's rather startling submission, in face of a written agreement of tenancy expressly providing for a three years' tenancy with dates of commencement and expiry both set out therein, appears to be based on the argument that since the rent was payable monthly, then the well-known presumption at common law applied and therefore the tenancy here was a monthly tenancy. Such a presumption is merely an inference which may be drawn or resorted to in the absence of an express agreement. It is entirely possible that learned counsel has treated this common law presumption on the basis of an irrebuttable presumption of law which has attained the status of being a rule of law e.g. a child under seven years of age is *doli incapax,* (see section 8 of our Penal Code). I find the third issue to be similarly of no substance.

The fourth and last issue raised by the tenant was that the landlord had failed to mitigate losses by renting out the factory building at such best rent available after the tenant had vacated it. Learned counsel for the tenant referred to the evidence of PW 1 that the landlord was offered $4,000/– rental a month by some prospective tenant but that the landlord had refused to accept it, insisting instead on the monthly rent of $5,928.75 hitherto paid by the tenant. The landlord preferred to wait until April, 1977 when a new tenant was found, at the same rental. The claim for rent by the landlord should be, according to learned counsel for the tenant, the difference between the monthly rental of $5,928.75 and $4,000/– for the period while the factory building was unlet after the tenant had left and before the new tenant came in. It is here, in my view, that the contention of learned counsel for the tenant, deserves a much closer examination.

In answer, interestingly, learned counsel for the landlord has raised two points of considerable refinement or importance, viz. that the landlord was in any event, not under any duty to mitigate its losses, and that in fact, in any event, the landlord had done in this case everything that could be reasonably expected, to mitigate its losses.

Learned counsel for the landlord has submitted in the first place, to the effect, that the duty to mitigate would only arise if the landlord had accepted the tenant's "breach of contract" and therefore treated the agreement as at an end. However, in this case, the landlord had not accepted the breach (i.e. vacating before the expiry of three years' term). Learned counsel referred to Ex. AB 1 – pages 10, 13, 22, 24 and 26, by which the landlord appears to have treated the tenancy agreement as still subsisting for the benefit of both parties. I have no doubt that the landlord had indeed taken this stand and that the tenant was similarly left in no doubt about this stand and the

landlord's constant claim to have the tenant held liable for rent even after the vacation of the factory building. For this rather unusual contention, learned counsel relied on the case of *White & Carter (Councils) Ltd.* v. *McGreggor*[3]. In that case, advertising agents on a certain day agreed to display advertisements for a garage proprietor for three years. Subsequently but on the same day, the proprietor wrote to the advertising agents saying that he did not want to proceed with the advertisements. The advertising agents refused to accept this and proceeded to carry out the advertisement work. After that, they sued for the payment. They were unsuccessful in both proceedings before the Sheriff and in the Court of Sessions. On appeal to the House of Lords, by a majority of 3 to 2, the appeal was allowed and judgment given for the advertising agents. Lord Reid, in the leading judgment, *inter alia,* said:—

"The general rule cannot be in doubt ... If one party to a contract repudiates it, in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept the repudiation and sue for damages for breach of contract, whether or not the time for performance has come, or he may, if he chooses, disregard or refuse to accept it and the contract remains in full effect."

Lord Reid and Lord Hodson in allowing the appeal were certainly aware of the somewhat unreasonableness of the appellants there, proceeding with an unwanted contract, wasting time and money, but both of them said to the effect, that to require the Court to decide whether it was reasonable or not to allow a party to enforce his full rights under a contract in similar circumstances would be to create too much uncertainty in the law.

I would respectfully adopt the view of Lord Reid. A repudiation in advance by one party to a contract, that he will not perform it before the arrival of the time for the performance by the repudiating party, does not, by itself, amount to a breach of contract, though it may optionally be, of course, regarded as such a breach by the other party in treating it as at an end. However, this course was not adopted by the advertising agents in the cited case neither was it adopted by the landlord in our instant case. I would add that, in practice, there cannot be many cases where such an innocent party can treat the contract as subsisting by continuing to perform his part of the obligations, for without the repudiating party's co-operation, or performance of some term, the innocent party is disabled in more ways than one from continuing to perform his obligations. However, in the cited case and the instant case, the innocent party happened to be able to do so.

Now, the governing principle is that the need or duty to mitigate one's losses can only arise if there is a breach of contract. This is self-evident, but when did the duty to mitigate losses in the instant case arise? Bearing in mind that the contract in this case was a three year tenancy and bearing in mind the ratio in the *Carter's* case above, it would seem that the breach arose when the landlord finally accepted the anticipatory repudiation, i.e. when the landlord finally took in a new tenant as from May 16, 1977. The claim of the landlord for loss of rent up to May 15, 1977 is therefore valid and proper, and there was no need for the landlord to try to reduce the losses for which the tenant would be responsible.

Should I be held wrong on this later, then in my judgment, the landlord had done all it reasonably could in mitigating its losses, by inserting advertisements in the newspapers and there was evidence, which I accepted, of the landlord passing the word round verbally about the factory building being available for letting. The only doubt I had at first was whether the landlord had acted reasonably in refusing to accept a tenant earlier (before May 15, 1977) at a rental of $4,000/—. The standard of conduct of plaintiffs in taking steps to mitigate their losses is one of whether the plaintiffs have acted reasonably, and it is a question of fact. Such standard was described by Lord Macmillan in *Banco De Portugal* v. *Waterlow and Sons, Limited*[4] in these words:—

"... Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment ... It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, ... The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably ..... he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken. ....."

I find that the conduct of landlord in insisting on a prospective tenant paying the same rent, in the absence of any evidence of falling market for the rental of similar premises, adduced by the tenant herein, was still reasonable, even though no doubt, the landlord was bold enough to so insist by reason of taking the stand that he was entitled to treat the contract as subsisting after the repudia-

tion in advance described above. I would therefore allow the claim for the rent.

Learned counsel for the plaintiffs, in his written submissions, has asked for interest which I have a discretion to award under section 11 of the Civil Law Act, 1956, on the rent claimed and allowed. I will allow it.

After crediting and therefore deducting the deposit of $11,857.50 paid by the defendant, I give judgment to the plaintiffs for the sum of $71,910/– being arrears of rent together with interest at 4% per annum thereon from May 16, 1977 to date of judgment, and thereafter at the rate of 8% per annum to date of payment, with costs to be taxed.

Before departing from this case, I must congratulate Mr. Yong, the learned counsel for the plaintiffs in preparing and arguing this case very well indeed.

Claim allowed.

Solicitors: *Dato S.M. Yong & Co., Syarikat K.L. Rekhraj.*

PUBLIC PROSECUTOR v. MOHAMED ISMAIL

[O. Cr. J. (Edgar Joseph Jr. J.) March 22 to 24, 28 to 31; April 4, 6, 15 & 18; July 15, 1983]
[Penang – Criminal Trial No. 6 of 1982]

Dangerous Drugs – Cannabis – Accused in possession of 6.044 kg. cannabis – Sentencing – Mitigating factor – Accused unjustifiably shot at head by police – Life imprisonment and 6 strokes of rattan – Definition of cannabis – Dangerous Drugs Act 1952, ss. 2, 37(da) 39(B)(1)(a).

Criminal Law & Procedure – Possession of 6.044 kg. cannabis – Sentencing – Mitigating factor.

The accused was caught in a police ambush on November 30, 1981 at about 9.45 pm. He was a pillion rider on a motor-cycle. He was seen hugging a white bundle with his right hand, at the same time resting it on his right thigh. There was also another motor-scooterist with him who made good his escape. The police fired three warning shots, one of which hit the accused in the head. The motor-cyclist in his haste to get away lost control of his machine, causing the pillion rider to be dislodged and fall to the ground, unconscious and bleeding from his head. The motor-cyclist, too, made good his escape. The accused who was caught had 6.044 kgs. of cannabis, in contravention of s.39 B(1)(a) of the Dangerous Drugs Act 1952 (the Act).

Held: (1) the court was satisfied on the evidence taken as a whole that the prosecution had proved the charge against the accused beyond all reasonable doubt. The presumption under s. 37(da) of the Act having arisen and there being no rebuttal of the same, the accused should be found guilty as charged and convicted;

(2) on the evidence and the circumstances of the case taken as a whole, the court was satisfied that the accused was deliberately and unjustifiably shot at in the head by Inspector Mahadi. But for timely surgical attention the accused may well have succumbed to his injuries. The culpability on the part of Inspector Mahadi was a factor to be taken into consideration in assessing sentence. The accused would therefore be sentenced to life imprisonment and only 6 strokes of the rattan as opposed to the maximum of 24.

[*Editorial Note:* The appeal both by the Public Prosecutor against sentence, and the accused against conviction, in Federal Court Criminal Appeal No. 22 of 1983 were withdrawn on November 8, 1983 and November 21, 1983 respectively.]

Cases referred to:

(1) *R.* v. *Goodchild (No. 2)* [1978] 1 All E.R. 649.
(2) *Public Prosecutor* v. *Puteh Nordin bin Abdul Rahman* [1983] 2 M.L.J. 292.
(3) *Chang Liang Sang & Ors.* v. *Public Prosecutor* [1982] 2 M.L.J. 231.

CRIMINAL TRIAL.

Mohamed Nordin bin Haji Sulaiman (Deputy Public Prosecutor) for the Public Prosecutor.
R. Rajasingam for the accused.

Cur. Av. Vult.

Edgar Joseph Jr. J.: At about 7.00 p.m. on November 30, 1981, A.S.P Mohd. Ariff bin Hamid (P.W.1), a member of the Criminal & Marine Division of the Penang Port Commission ('P.P.C.'), had had his dinner and was resting at home, when he received a telephone message informing him that cannabis would be conveyed on motor cycles proceeding from the direction of certain godowns in the P.P.C. area later that night. A.S.P. Ariff wasted no time in organising an ambush party consisting of himself and six others – all auxiliary police personnel attached to the P.P.C. – and by 8.30 p.m. they had taken up ambush positions at various strategic points on the P.P.C. premises.

It would be tedious and unnecessary to recount in detail the testimony of the members of the ambush party who gave evidence and what I propose to do is to merely touch on the essential facts established by that testimony.

The ambush party did not have to wait long